BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
DEC 18 1985
CLERK

No. 85-573

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

PUBLIC SERVICE COMPANY OF COLORADO,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PUBLIC SERVICE COMPANY OF COLORADO

JAMES R. MCCOTTER
TIMOTHY J. FLANAGAN
KELLY, STANSFIELD & O'DONNELL
550 - 15th Street
Suite 900
Denver, Colorado 80202
(303) 825-3534

Of Counsel:
BRYANT O'DONNELL
Executive Vice President and General Counsel
Public Service Company of Colorado
550 - 15th Street
Denver, Colorado 80202

MICHAEL BOUDIN *
NICHOLAS W. FELS
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 75[illegible]
Washington, D.C. 20044
(202) 662-6000

Counsel for Petitioner

* *Counsel of Record*

December 1985

TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	6

TABLE OF AUTHORITIES

CASES:

South Carolina Electric & Gas Co. v. *FPC*, 338 F.2d 898 (4th Cir. 1964)	2, 3
United States v. *Colorado Power Co.*, 240 F. 217 (D. Colo. 1916)	2, 3
Washington Water Power Co. v. *FERC*, 775 F.2d 305 (D.C. Cir. Oct. 18, 1985)	2

STATUTES AND REGULATIONS:

Act of February 15, 1901	2
Federal Power Act,	
Section 10(f)	1, 2, 5
Section 23(a)	1, 2
Section 27	3, 4
S. Doc. No. 80	4, 5
31 Pub. Lands Dec. 13-18	2
Sup. Ct. R. 22.4	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-573

PUBLIC SERVICE COMPANY OF COLORADO,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PUBLIC SERVICE COMPANY OF COLORADO

Pursuant to Sup. Ct. R. 22.4, Public Service Company of Colorado hereby replies to the brief in opposition for the Federal Energy Regulatory Commission. By its very persistence in refusing to defend the Tenth Circuit's reasoning below, the FERC's brief points up the inadequacies of the court's decision and underscores the need for review here.

1. The FERC makes no pretense of supporting the Tenth Circuit's holding that, by amending section 10(f) of the Federal Power Act in 1935, Congress intended to override the terms of pre-1920 permits and "transfer jurisdiction" over such permits to the Federal Power Commission. 754 F.2d at 1563 (Pet. App. 12a-13a). That holding ignores section 23(a) of the Power Act,

which was enacted simultaneously with the amendment of section 10(f) and which specifically disclaimed any intent to "affect" the rights of pre-1920 permittees.[1] The Tenth Circuit's holding also conflicts with *South Carolina Electric & Gas Co.* v. *FPC*, 338 F.2d 898 (4th Cir. 1964), under which the terms of a pre-1920 permit determine whether headwater charges may be levied.[2] (Pet. 9-11.)

Instead of defending the Tenth Circuit's holding, the FERC claims that, as construed in *United States* v. *Colorado Power Co.*, 240 F. 217 (D. Colo. 1916), the Shoshone permit *does* authorize the imposition of headwater benefits charges, and that the present case was therefore "resolved by the Tenth Circuit consistently with [*South Carolina*]." (Opp. 8.) The agency's assertion simply blinks the fact that 1901 Act permits were issued "under general regulations to be fixed by the Secretary of the Interior," and those regulations *nowhere* provide for anything akin to headwater benefits charges. 31 Pub. Lands Dec. 13-18. The FERC likewise ignores the court's unambiguous statement in *Colorado Power* that to levy a charge based upon electric output would "carry the power granted to [the Secretary] to a doubtful length and further than, I think, is given by the Act." 240 F. at 221.[3] The Shoshone permit does not admit of

---

[1] Very recently, in reversing a FERC order as inconsistent with section 23(a), the Court of Appeals for the D.C. Circuit has stressed the breadth of the prohibition in that section against action "affecting" the rights of pre-1920 permittees. Washington Water Power Co. v. FERC, 775 F.2d 305, 325 (D.C. Cir. Oct. 18, 1985).

[2] Nor is there any statute purporting to "transfer jurisdiction" of permits under the Act of February 15, 1901, from the Secretary of the Interior to the FERC. (See Pet. 7.)

[3] The monthly charge of some $100 in *Colorado Power* was upheld because not shown to be "more than necessary in the protection of [the Government's] rights." 240 F. at 221. Those "rights," the court made clear, are the specific rights not to suffer injury from

headwater benefits charges, and the FERC's effort to circumvent the point of conflict with *South Carolina* is unavailing.

In short, the question whether the Federal Power Act imposes headwater-benefits liability on pre-1920 permittees, when there is no such reservation in the permit or the permit-authorizing statute, involves the construction of federal legislation on a matter of continuing importance. The Tenth Circuit's reasoning cannot be defended, and the FERC makes no effort to do so. There is a direct conflict between the holding of the Tenth Circuit and the approach adopted by the Fourth Circuit in *South Carolina*.

2a. The brief in opposition likewise declines to defend the court of appeals' holding that Public Service Company lacks state water rights in releases from Green Mountain Reservoir. Instead, the FERC claims that, because state water rights are merely "proprietary" in nature, section 27 of the Federal Power Act (which provides that nothing in the Act will "in any way interfere with" state water rights) does not preclude regulation of the "energy potential" of the water (Opp. 8-9); indeed, state water rights are said to be "irrelevant" to headwater benefits charges (Opp. 10).

This alleged distinction, on which the FERC now relies in opposition to certiorari, would trivialize section 27 and is untenable. Section 27 forbids the FERC to override state water law and, as the Tenth Circuit observed, does *not* permit the FERC "to assess charges for the use of water to which PSC has a vested right . . . ." 754 F.2d at 1566 (Pet. App. 18a). The FERC's extravagant claim of federal preemptive authority, and its

---

waste of the Government lands surrounding the project. *Id.* Clearly, the Government's authority to charge for waste is not tantamount to authority to levy fees that by some other measure might be deemed reasonable.

casual disregard of state rights protected by section 27, are inconsistent with the very decision it is seeking to defend.[4]

2b. Public Service Company's petition argued, as a further basis for certiorari, that paragraph (c) of Senate Document No. 80 granted Shoshone the use of 1,250 c.f.s. "without charge" and that paragraph (d) explicitly assigned to others (who contract with the federal government) the very costs here sought to be recovered from Shoshone.[5] The Tenth Circuit said that the "without charge" language did not apply to Shoshone, even though Shoshone's right to 1,250 c.f.s. is preserved in the language that immediately follows the "without charge" clause in the same paragraph. In opposing certiorari, the FERC conspicuously declines to defend the Tenth Circuit's strained reading of the "without charge" requirement of paragraph (c). (See Pet. 15 n.19.)

Instead, the FERC claims that paragraph (c) is designed to protect Western Slope users (such as Shoshone) only against charges for *replacement of water diverted to the Eastern Slope* and not against charges for enhanced flows created by the Green Mountain development. (Opp. 11.) This is an impossible reading of paragraph (c) which, needless to say, the Tenth Circuit itself did not adopt. The "without charge" language (quoted at Pet. 4) is expressly directed to the 100,000 acre-foot pool of *enhancement* water; the separate 52,000 acre-foot pool of *replacement* water is covered not by paragraph (c) but by paragraph (b) (Pet. App. 2j). The "without

---

[4] The FERC says that this Court does not ordinarily review determinations of state law even by federal courts. (Opp. 8.) However, the FERC is not attempting to defend the lower court's mistaken statements about Colorado law. It is instead urging construction of a federal statute in order to sustain the result below.

[5] The FERC concedes that Senate Document No. 80 has been embodied in subsequent legislation and has the force of a federal statute. (Opp. 4-5 n.5.)

charge" provision in paragraph (c) thus applies explicitly, and exclusively, to enhancement water, and the FERC's argument is utterly without basis.[6]

3. Finally, the FERC claims that the "plain language" of the first paragraph of section 10(f) of the Power Act allows it to impose investigative costs upon pre-1920 permittees, such as Public Service Company, that are being assessed headwater benefits charges. (Opp. 12.) The language of that first paragraph (which begins "whenever any *licensee* hereunder is directly benefited") is, indeed, plain. It says that permittees and licensees pay investigative costs when a *licensed* project is the downstream, *i.e.*, "benefited," project. Shoshone, the downstream project allegedly benefited in the present case, is an *unlicensed* project and is therefore not within the ken of the first paragraph.

Situations where an unlicensed project such as Shoshone are downstream are explicitly covered by the third paragraph (beginning "whenever any power project not under license is benefited . . ."), which nowhere provides for levying investigative costs on anyone. The statute cuts cleanly between the two situations and its language could hardly be clearer. Claims that the agency's construction is entitled to weight (Opp. 12-13) provide no basis for overriding the plain language chosen by Congress.[7]

---

[6] The FERC's concession that under S. Doc. 80 Green Mountain Reservoir was to be "largely" self-supporting (Opp. 11) does not go quite far enough. Paragraph (d) of S. Doc. 80 specifies that "*the* costs of construction and perpetual operation and maintenance" (emphasis added) are to be recovered from parties on the Eastern Slope or elsewhere who contract with the Secretary, *i.e.*, from parties other than the owner of Shoshone.

[7] The FERC's claim of a longstanding and unqualified administrative construction in its favor is not easily squared with the fact that the agency found it necessary to overrule its own Administrative Law Judge in this case. The ALJ held that the FERC could not impose investigative costs on Shoshone. (Pet. App. F.)

CONCLUSION

For the reasons stated above and in the petition, certiorari should be granted.

Respectfully submitted,

JAMES R. McCOTTER
TIMOTHY J. FLANAGAN
KELLY, STANSFIELD & O'DONNELL
550 - 15th Street
Suite 900
Denver, Colorado 80202
(303) 825-3534

MICHAEL BOUDIN *
NICHOLAS W. FELS
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Of Counsel:
BRYANT O'DONNELL
Executive Vice President and General Counsel
Public Service Company of Colorado
550 - 15th Street
Denver, Colorado 80202

Counsel for Petitioner

December 1985

* *Counsel of Record*